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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	**CS Docket No. 96-46**
	)	
	)	
Open Video Systems	)	

COMMENTS OF CABLEVISION SYSTEMS CORPORATION ON THE PETITION FOR RECONSIDERATION OF THE NATIONAL CABLE TELEVISION ASSOCIATION

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Cablevision Systems Corporation ("Cablevision"),[1/] by its attorneys and pursuant to Section 1.429 of the Federal Communications Commission's Rules,[2/] hereby submits these Comments with respect to the Petition for Reconsideration filed by the National Cable Television Association ("NCTA")[3/] in the above-captioned proceeding.[4/] For the reasons stated herein, Cablevision strongly supports the Petition of NCTA seeking reconsideration of the mandatory interconnection requirement for public, educational, and government ("PEG") access as it relates to Open Video Systems ("OVS").

[1/] Cablevision, a producer and packager of video programming, is in the business of developing and marketing a diverse array of video programming services.

[2/] 47 C.F.R. § 1.429.

[3/] Petition for Reconsideration, filed July 2, 1996.

[4/] In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, CS Docket No. 96-46, Report and Order and Notice of Proposed Rulemaking, rel. March 11, 1996 ("NPRM"); Second Report and Order, rel. June 3, 1996 ("Order").

INTRODUCTION AND SUMMARY

Cablevision urges the Commission to reconsider its decision mandating cable systems to interconnect its PEG channels with operators of open video systems.[5/] There is no statutory or policy basis for the mandatory interconnection of PEG feeds. Left unchanged, such a requirement will fundamentally alter the competitive framework of open video systems and unfairly advantage local exchange carriers in the video marketplace -- contrary to the statutory framework envisioned by Congress.[6/] Consequently, the Commission should reconsider its decision to require mandatory interconnection in circumstances where negotiations between cable and OVS operators do not result in voluntary agreements to share PEG feeds.

Public, educational, and governmental access channels have been set aside over the years as a result of agreements between cable operators and local franchising authorities in return for permission to install cables under city streets and for the use of public rights-of-way.[7/] Pursuant to the Telecommunications Act of 1996,[8/] PEG access obligations apply to

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[5/] Order at ¶ 145.

[6/] Although the Commission should not compel cable operators and OVS operators to share PEG programming, OVS operators should be free to negotiate with cable systems to contract for PEG channel feeds. In the event that arrangements cannot be reached between the parties, however, the OVS operator should be required separately to comply with the PEG requirements, as mandated by Congress. See 47 U.S.C. § 573(c)(1).

[7/] See 47 U.S.C. § 532(b). See also Denver Area Educational Telecommunications Consortium, Inc., et al. v. FCC, No. 95-124, slip op. at 3, ___ U.S. ___ (1996) ("Alliance").

[8/] Pub. L. No. 104-102, 110 Stat. 56, approved Feb. 8, 1996 (codified at various sections of 47 U.S.C.) ("1996 Act").

open video systems.[9/] In implementing OVS, the Commission determined not only that OVS operators should negotiate with local authorities to establish their PEG obligations, which must be no greater or lesser than the obligations imposed on cable operators,[10/] but that it could mandate interconnection by cable operators of their facilities to ensure that OVS operators meet their PEG obligations under the Act.[11/]

The resulting scheme improperly allows OVS operators to benefit from the efforts, investment, and relationships of local cable operators in providing PEG access to the public; fails to further the fundamental goals underlying access regulation; and contravenes the law. Accordingly, the Commission must reverse its decision with respect to the PEG obligations of OVS operators.

I. THE PEG INTERCONNECTION REQUIREMENT CONTRAVENES THE COMMUNICATIONS ACT

The Commission's decision to require cable operators under certain circumstances to interconnect their PEG feeds is flatly unlawful. Congress has already established in Title VI a statutory proscription against regulating a cable system as a common carrier or utility.[12/]

[9/] Id. Sec. 302(a).

[10/] 47 U.S.C. § 573(c)(2)(A).

[11/] In the event that such negotiations fail to result in an agreement, the rules require each OVS operator to satisfy the same obligations as the local cable operator. Order at ¶ 141. While these provisions make sense in light of the statutory mandate, the Commission wrongly decided to go one step further. Deciding that the "burden" of PEG obligations should be "shar[ed,]" the Commission required cable operators "to permit [OVS] operators to connect with their PEG feeds." Id. at ¶ 145. Somehow, it reasoned, requiring "the costs of connection and maintaining PEG services facilities and equipment" to be "divided equitably between the cable operator and the [OVS] operator" would result in a satisfactory arrangement. Id. at ¶ 146.

[12/] 47 U.S.C. § 541(c).

Cable operators are not common carriers, and are not subject to the numerous obligations imposed on common carriers under Title II.[13/] Yet, the Commission's interconnection requirement effectively treats cable operators as "PEG utilities," ignoring the unique status of cable television under Title VI [14/]

It is undisputed that interconnection obligations are a fundamental aspect of common carrier regulation.[15/] Indeed, interconnection obligations are generally imposed on Title II communications carriers as a critical component of their roles as carriers who hold themselves out on a nondiscriminatory basis to the public.[16/] In contrast, cable operators under Title VI operate under a wholly different regulatory scheme -- one in which they are afforded substantial control and to which common carriage obligations do not apply. To the extent they provide cable service, cable operators are explicitly not "telecommunications carriers," nor can they be deemed common carriers in this regard.[17/] There is no room in the cable regulatory scheme for imposing interconnection requirements on cable operators -- especially when Congress expressly declined to impose the requirement in the Act itself.

[13/] Id. § 201 et seq.

[14/] Id. § 601 et seq.

[15/] Id. §§ 201(a), 251(c)(2).

[16/] Id. § 251(a). See also Nat'l Assoc. of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 641 (D.C. Cir.) ("What appears to be essential to the . . . common carrier concept is that the carrier 'undertakes to carry for all people indifferently . . . . .'" (citations omitted)), cert. denied, 425 U.S. 992 (1976).

[17/] See Id. § 153(44) (defining telecommunications carrier); Id. § 541(c) (providing that a cable carrier shall not be subject to common carrier regulation by virtue of providing cable service).

The Commission arrives at its new rule wholly unsupported by the 1996 Act's plain language -- indeed, without a firm foothold on the Communications Act itself, which clearly distinguishes between common carriers and cable operators. The only instance where any type of joint use of cable facilities is even contemplated is with respect to the cable drops, where such use is permitted only if it is reasonably limited in scope and duration and the cable operator concurs.[18/] While Congress could have also expressly set forth provisions for "sharing" the burdens of providing PEG programming, instead, it chose to require that the PEG requirement, and other obligations, are met fully by OVS operators.[19/]

Finally, the Act requires that OVS operators must be subject to PEG access requirements that are "no greater or no lesser than the obligations" of cable operators under Section 611.[20/] The Commission has ignored this straightforward statutory mandate by allowing OVS operators to get by with merely renting their PEG feeds from cable operators. Meanwhile, cable operators are limited in their ability to recoup investments of time and resources in PEG channels. Such a result flies in the face of the language of the 1996 Act.

II. THE PEG INTERCONNECTION REQUIREMENT IS CONTRARY TO SOUND POLICY

The Commission's decision to mandate interconnection also contravenes the underlying policies of the Communications Act with respect to PEG access and the need for competitive parity. The Act specifically provides that neither OVS nor cable should be favored by the Commission's rules. For example, OVS operators are subject to Section 611

[18/] Cf. Id. § 572(d)(2).

[19/] Id. § 573(c)(2)(A).

[20/] Id. § 573(c)(2)(A).

in the same manner that cable operators are, which includes provision of all facilities, support, resources and other aspects of PEG access programming.[21/] The Act sets forth a policy of regulatory parity. By its decision, however, the Commission dramatically reduced the burden on OVS operators of providing PEG channels -- and raised the burden on cable operators -- by mandating interconnection for PEG feeds.

Critically, the interconnection requirement undermines the Congressional objective of competitive parity[22/] by imposing the primary PEG obligation on cable operators alone. Existing PEG channels are sometimes the result of years of efforts and negotiations, the cost of which should not be borne solely by cable operators with OVS operators acting as free-riders.[23/] Allowing OVS operators to bypass this requirement by piggy-backing on the efforts of cable operators essentially awards a marketplace "boost" -- which translates into a direct financial benefit and unfair competitive advantage -- to the OVS operator.

Moreover, even obligating OVS operators to fund some "share" of the costs associated with providing PEG programming,[24/] standing alone, is unfair.[25/] First, PEG obligations frequently involve capital outlays made by cable companies over a long period of

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[21/] Id. § 573(c)(1)(B).

[22/] See S. Rep. 230, 104th Cong., 2d Sess. 178 (1996).

[23/] For instance, Cablevision has often expended hundreds of thousands of dollars per annually franchise area in an effort to meet its PEG access obligations, not to mention in-kind support, studios, facilities, and other resources.

[24/] Order at ¶ 141.

[25/] As noted, the proposed interconnection requirement "require[s] OVS operators to share some of the monetary costs but not the full burden incurred by cable operators in complying" with the PEG requirement. See Comcast Cable Communications, Inc., Petition for Reconsideration, filed July 5, 1996 at p.8 ("Comcast Petition") (emphasis in original).

time. Thus, under a mandated interconnection scheme, OVS operators would be permitted to benefit unfairly from expenses incurred over that period of time. Notably, in some cases, cable operators voluntarily make significant additional investments in PEG services to distinguish their own offerings. There is certainly no sound reason to allow OVS operators to reap the benefits of these efforts. Secondly, PEG obligations frequently extend far beyond the simple payment of funds.[26] OVS operators should not be permitted to profit from these efforts of cable operators.

In this regard, even assuming that cable operators could somehow be compensated fully and fairly for their direct and identifiable costs, there are also "soft costs" and "intangibles" that no accounting scheme can address adequately. For example, "soft costs" include the input and efforts involved with managing the access endeavor and its facilities, including use of the general manager, legal staff and others involved in administration and decisions regarding programming. Likewise, "intangibles" include the potential ill-will that can be generated as a result of the exercise of First Amendment rights by PEG speakers, including ill-will between these speakers and the cable company and between subscribers and the company. As the passive recipient of the PEG feeds, the OVS operator will not suffer these same "intangible" costs. Certainly no accounting scheme is capable of capturing fully these costs or of measuring the extent of ill-will or damage that is generated thereby. As

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[26] For example, cable operators often devote considerable human resources -- including substantial training of users -- promotional efforts, equipment, and studio space to PEG programming. If the Commission truly seeks to implement a nondiscriminatory system based solely on remittance of funds for PEG access, however, cable operators should also have such an option.

such, there is no basis for the Commission to conclude a simple transfer of monies can serve to compensate cable operators fully for the use of PEG feeds by OVS operators.

Moreover, by its terms, the Commission's decision is premised on the notion that "duplication of . . . facilities" would be inefficient, and that shared access would not unnecessarily "dilu[te] the number and quality of PEG access channels received by the community."[27/] Yet, the Commission has cited to no evidence that these conclusions are correct other than it saying it is so. In fact, telephone companies themselves have argued that it actually costs more to interconnect than to provide stand-alone PEG facilities and services.[28/] If this is true, as these companies assert, the Commission's decision regarding the interconnection of PEG feeds could actually result in higher costs to consumers and an inefficient allocation of OVS facilities and resources.

The Commission likewise failed to explain why the so-called "duplication" of PEG obligations is not in the public interest, as it would promote, rather than frustrate, a broader array of diverse, community-sponsored voices. If OVS operators are required to provide their own PEG channels, it is most likely they would have an incentive to create new programs, produce more speakers, foster more choices for consumers, and promote a more robust marketplace of ideas For example, it is easy to imagine a circumstance where the

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[27/] Order at ¶ 145.

[28/] Application of SNET Personal Vision, Inc. for a Certificate of Public Convenience and Necessity to Provide Community Antenna Television Service, Conn. Dept. of Public Utility Control, No. 96-01-24, Brief of SNET Personal Vision, Inc. and The Southern New England Telephone Company, July 3, 1996 at p.47 n.58 ("Indeed, interconnection is more costly than providing community access through third-party and non-profits and is more expensive than building facilities.").

governmental access channel of the cable operator is being used to deliver a county council meeting and the similar channel of the OVS operator is used to deliver a school board meeting. Additional studios and PEG channels would provide additional community access and flexibility in terms of time and technical capabilities -- all to the benefit of the public. Not only is such a result not "duplicative," it would affirmatively serve to enhance the First Amendment values that are at the core of the PEG requirements.[29/] Clearly, rather than enhancing the purposes of PEG access, the Commission's decision thwarts them.

Thus, if OVS operators and local franchise authorities are unable to reach an agreement with respect to PEG issues, the appropriate default mechanism for the Commission to adopt is for the OVS operator to comply fully itself with Section 611 of the Communications Act, as Congress expressly required. Otherwise, OVS operators are in effect rewarded for their failure to undertake their obligations by being allowed to free-ride. The Commission should act to fulfill both the letter and the spirit of the law and mandate that OVS operators fully meet their obligations with respect to PEG access. Anything less makes a mockery of the Act's pro-competitive aspirations.[30/]

[29/] 47 U.S.C. § 531. Thus, Congress stated that, "A requirement of reasonable third-party access to cable systems will mean a wide diversity of information sources for the public -- the fundamental goal of the First Amendment . . ." and that "PEG channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work." See H.Rep. 98-934, Cable Franchise Policy and Communications Act of 1984, Report of the Committee on Energy and Commerce, 98th Cong., 2d Sess., at 30.

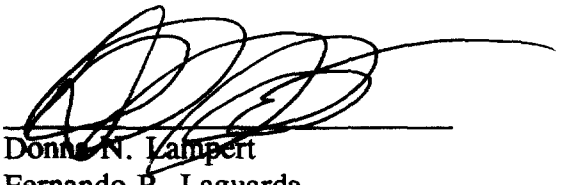
[30/] See Comcast Petition at p.11 (noting the disparity of allowing OVS operators to choose whether to take cable operators' PEG feeds at half their cost or negotiate less onerous PEG burdens with the local franchising authorities, but not allowing cable operators to do the same).

CONCLUSION

For the foregoing reasons, the Commission should reconsider its decision mandating interconnection as a mechanism for OVS operators to fulfill their PEG obligations.

Respectfully submitted,

CABLEVISION SYSTEMS CORPORATION



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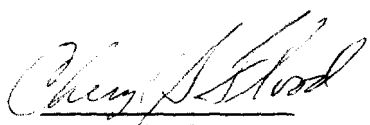
I, Cheryl S. Flood, hereby certify that on this 15th day of July 1996, I caused copies of the foregoing "Comments of Cablevision Systems Corporation on the Petition for Reconsideration of the National Cable Television Association," to be sent by first-class mail, postage prepaid, or to be delivered by messenger(*) to the following:



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